Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S7-24-899-1990
LIM BENG CHOON J
10 MAY 1991

Companies and Corporations *— Winding up — Prohibitory order — Order entered against company's land after presentation of petition to wind up company — Whether order valid — Whether prohibitory order in nature of execution of judgment — Whether prohibitory order falls within s 224 of the Companies Act 1965 — Construction — Companies Act 1965 ss 219(2), 224 & 298 — National Land Code 1965 ss 335 & 336(1)*

Land Law *— Prohibitory order — Order entered against company's land after presentation of petition to wind up company — Whether order valid — Whether prohibitory order in nature of execution of judgment — Whether prohibitory order falls within s 224 of the Companies Act 1965 — Construction — Companies Act 1965 ss 219(2), 224 & 298 — National Land Code 1965 ss 335 & 336(1)*

The plaintiffs agreed to construct a building on the first defendants' land. The first defendants failed to pay the plaintiffs and judgment was obtained against the first defendants by the plaintiffs. Subsequently the plaintiffs agreed to complete the construction provided the first defendants paid the construction cost within a stipulated time. The first defendants, however, did not pay the plaintiffs despite the completion of the construction. The plaintiffs therefore obtained judgment against the first defendants. An agreement was entered whereby the first defendants sold their land to the second defendants. Petitions to wind up the first defendants by the plaintiffs and other parties were then presented to the High Court. The plaintiffs subsequently entered two prohibitory orders obtained pursuant to s 335 of the National Land Code 1965 against the land. They also applied to the High Court for, inter alia, a declaration that the first defendants' transfer of the land to the second defendants was void. The plaintiffs obtained an ex parte interlocutory injunction to restrain the first and second defendants from dealing with the land. The second defendants applied to the High Court to set aside the plaintiffs' interlocutory injunction on the ground that once the winding-up petitions had been presented against the first defendants, the plaintiffs had no right to enter the prohibitory orders according to s 224 read with s 219(2) of the Companies Act 1965 ('the Act'). The plaintiffs argued, inter alia, that s 224 should be read in conjunction with s 298 of the Act.

Held, allowing the second defendants' application:

(1) Sections 224 and 219(2) of the Act are mandatory not only because the word 'shall' is used but also because, unlike s 223 of the Act, no power is given to the court to validate the acts stated in s 224 of the Act.

(2) Prohibitory orders are in the nature of an execution of the judgment of the court relating to land. The plaintiffs' prohibitory orders accordingly fall within s 224 of the Act.
(3) English cases based on the interpretation of s 523(1) of the UK Companies Act 1985, which is not in pari materia with s 224 of the Act, are not appropriate in construing the scope of s 224.
(4) There is nothing in ss 224 and 298 of the Act which states that both sections should be read in conjunction with each other. To construe s 224 as dependent on or subject to s 298 will not only render s 224 redundant but will also obliterate the purpose for which s 224 was enacted. The purpose of s 224 is to ensure that between the date of presentation of the winding-up petition and the date of the winding-up order, the company's property should not be dissipated to enrich one or more unsecured creditors at the expense of other unsecured creditors. The purpose of s 298 of the Act is, however, to empower the liquidator to recover any dissipation of the company's assets which had been wrongly acquired by a creditor through an evasion of s 224 of the Act. Both ss 224 and 298 deal with completely different situations.
(5) The plaintiffs accordingly had no right to enter the prohibitory orders. The plaintiffs' prohibitory orders are thus null and void under s 224 of the Act.

[**Bahasa Malaysia summary**

Plaintif telah bersetuju membina sebuah bangunan di atas tanah defendan pertama. Defendan pertama gagal membayar plaintif dan penghakiman telah diperolehi terhadap defendan pertama oleh plaintif. Kemudiannya, plaintif bersetuju menghabiskan kerja pembinaan asalkan defendan pertama membayar kos pembinaan di dalam masa yang dinyatakan. Defendan pertama, namun demikian, tidak membayar plaintif walaupun kerja pembinaan telah dihabiskan. Oleh itu plaintif telah memperolehi penghakiman terhadap defendan pertama. Satu persetujuan telah dicapai di mana defendan pertama telah menjual tanah mereka kepada defendan kedua. Petisyen untuk menggulung defendan pertama oleh plaintif dan pihak-pihak lain telah dipersembahkan ke Mahkamah Tinggi. Plaintif kemudiannya memasukkan dua perintah larangan (prohibitory order) yang diperolehi menurut s 355 Kanun Tanah Negara 1965 terhadap tanah itu. Mereka juga memohon kepada Mahkamah Tinggi untuk, antara lainnya, satu deklarasi bahawa pemindahan milik oleh defendan pertama kepada defendan kedua adalah terbatal. Plaintif telah memperolehi satu injunksi interlokutori ex parte untuk menahan defendan pertama dan kedua daripada membuat urusan berkenaan tanah itu. Defendan kedua memohon kepada Mahkamah Tinggi untuk mengetepikan injunksi interlokutori plaintif atas alasan bahawa sebaik sahaja petisyen penggulungan dipersembahkan terhadap defendan pertama, plaintif tidak lagi berhak memasukkan perintah larangan menurut s 224 dibaca bersama dengan s 219(2) Akta Syarikat 1965 ('Akta itu'). Plaintif berhujah, antara lainnya, bahawa s 224 harus dibaca bersama dengan s 298 Akta itu.

Diputuskan, membenarkan permohonan defendan kedua itu:

(1) Seksyen 224 dan 219(2) Akta itu adalah mandatori bukan sahaja kerana perkataan 'shall' digunakan tetapi juga kerana, berlainan daripada s 223 Akta itu, tiada kuasa diberikan kepada mahkamah untuk mensahkan tindakan-tindakan yang dinyatakan di dalam s 224 Akta itu.

(2) Perintah larangan adalah bersifat suatu pelaksanaan penghakiman mahkamah berkenaan tanah. Perintah larangan plaintif oleh itu termasuk di dalam s 224 Akta itu.

(3) Kes-kes Inggeris yang berasaskan pentafsiran s 523(1) Akta Syarikat 1985 [UK], yang bukan dalam pari materia dengan s 224 Akta itu, tidak sesuai untuk mentafsir lingkungan s 224.

(4) Tiada apa-apa dalam ss 224 dan 298 Akta itu yang menyatakan bahawa kedua-dua seksyen itu harus dibaca satu bergandingan dengan yang lain. Mentafsir s 224 sebagai bergantung kepada atau tertakluk kepada s 298 tidak akan cuma menjadikan s 224 berlebihan sahaja tetapi akan juga membasmikan tujuan kenapa s 224 diperundangkan. Tujuan s 224 ialah untuk memastikan bahawa di antara tarikh persembahan petisyen penggulungan dan tarikh perintah penggulungan, harta syarikat tidak dilupuskan untuk memperkayakan satu atau lebih pemiutang tidak bercagar semasa merugikan pemiutang tidak bercagar yang lain. Tujuan s 298 Akta itu, walau bagaimanapun, ialah untuk membolehkan likuidator mendapat kembali apa-apa pelupusan harta syarikat yang telah diperolehi secara salah oleh seseorang pemiutang melalui pengelakan s 224 Akta itu. Kedua-dua ss 224 dan 298 berhubung dengan situasi yang sungguh berbeza.

(5) Oleh itu plaintif tidak ada hak memasukkan perintah larangan itu. Jadi perintah larangan plaintif adalah terbatal dan tak sah di bawah s 224 Akta itu.]

[**Editorial Note**: The second defendants appealed to the Supreme Court vide Civil Appeal No 02–384–91. The appeal was heard on 31 March 1992 and the court (comprising Abdul Hamid Omar LP, Peh Swee Chin and Edgar Joseph Jr SCJJ dismissed the appeal.]

[**Note**: Section 523(1), amongst other sections, of the Companies Act 1985 [UK] has been repealed, with savings, by the Insolvency Act 1986 and replaced in s 128 thereof — see 4 *Halsbury's Statutes* (4th Ed) at p 810 and 8 *Halsbury's Statutes* (4th Ed) at p 533.]

Cases referred to

1 *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 (folld)
2 *Associated Tractors Sdn Bhd v Chan Boon Heng & Anor* [1990] 2 MLJ 408 (refd)
3 *In re Overseas Aviation Engineering (GB) Ltd* [1963] 1 Ch 24 (folld)
4 *Re Leitch Collieries Ltd* [1926] 1 DLR 1183 (folld)
5 *Tye Chwee Hoon v Cayman Commodities (M) Sdn Bhd & Anor* [1990] 2 MLJ 23 (folld)

6 *Re Barrier Reef Finance & Land Pty Ltd* [1988] 6 ACLC 827; (1988) 13 ACLR 708 (folld)
7 *Fleet Motor & General Insurance Co (Aust) Pty Ltd v Tickle* [1984] 2 ACLC 282; [1984] 1 NSWLR 210 (distd)
8 *Re Miles Aircraft Ltd (Application of Barclay's Bank Ltd & Erlangers Ltd)* [1948] 1 All ER 225 (distd)
9 *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1975] 2 All ER 537 (distd)
10 *Galbraith v Grimshaw* [1910] AC 508 (refd)
11 *E Pritchard v Westminster Bank Ltd* [1969] 1 All ER 999 (folld)
12 *D Wilson (Birmingham) Ltd v Metropolitan Property Developments Ltd & Anor* [1975] 2 All ER 814 (refd)
13 *Rainbow & Anor v Moorgate Properties Ltd* [1975] 2 All ER 821 (refd)
14 *Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1987] 1 MLJ 56 (folld)
15 *Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 (folld)

Legislation referred to

Companies Act 1965 ss 218(1)(e), 219(2), 221, 223, 224, 298(1)(c)
National Land Code 1965 ss 335, 336(1), 417, 420
Companies Act 1985 [UK] ss 523(1), 527(1)
Companies Code [Qld] ss 364, 365, 368(3)
Insurance Act [Aust] ss 62(8), 116(1)
Winding-up Act [Can] s 23

PS Gill (Gill & Tang) for the plaintiffs.
Pakhruddin Sulaiman (Nik Saghir Yaacob & Ismail) for the second defendants.

Cur Adv Vult

Lim Beng Choon J: On 28 June 1990, the plaintiffs, Pembinaan KSY Sdn Bhd, filed this originating summons in which Lian Seng Properties Sdn Bhd was named as the first defendants and Noble Circle (M) Sdn Bhd was made the second defendants. By this originating summons, the plaintiffs asked for the following reliefs:

1 Satu deklarasi yang semua pemindahan semua tanah-tanah ini yang disenaraikan dalam jadual daripada defendan pertama kepada defendan kedua adalah bertentangan dengan s 336 Kanun Tanah Negara diisytiharkan tak sah (null and void).
2 Yang Pendaftar Geran Tanah Kuala Lumpur diarah untuk membatalkan pendaftaran, pengindorsan di atas nama defendan kedua, Noble Circle (M) Sdn Bhd daripada buku pendaftaran hakmilik dalam perkara berkaitan dengan tanah yang disenaraikan dalam jadual.
3 Dan seterusnya atas pengeluaran deklarasi, satu perintah untuk menghalang defendan pertama daripada menjual, menghapuskan, mencagarkan atau sebaliknya tanah berkenaan sehingga perintah selanjutnya dari mahkamah.

On the same date the plaintiffs also made an application by way of an ex parte summons-in-chambers in which they requested firstly, for an interlocutory injunction to restrain the first defendants from selling, charging, transferring the possession of some 131 apartments of Kuala Lumpur Plaza ('KL Plaza') erected on the several parcels of land originally belonging to the first defendants and the said lands were referred to in the affidavit in support (encl 2) as 'the scheduled lands'. For consistency I shall also in this judgment refer to the said lands as the scheduled lands. Secondly, the plaintiffs asked for an interlocutory injunction to restrain the second defendants from selling, charging, disposing or transferring all or part of the scheduled lands and KL Plaza to a third party without consent of the court. Finally, the plaintiffs asked for an injunction of like nature to restrain the second defendants from transferring the 131 apartments to a third party and registering them under the name of the third party or charging the same to a third party without the consent of the court.

In support of its originating summons, one Peter Kua Tian Nam, the managing director of the plaintiffs affirmed an affidavit on 28 June 1990 (encl 2). The crux of the case for the plaintiffs as can be gleaned from this affidavit is as follows. The plaintiffs were appointed by the first defendants to construct and complete the KL Plaza on the scheduled lands pursuant to a building contract dated 14 April 1983. In the course of construction, the first defendants failed to pay the plaintiffs progress payments as certified by the consulting architect of the project. The progress payments were in the sum of $10,529,000. As a result the plaintiffs instituted proceedings in the Kuala Lumpur High Court in Civil Suit No 23–39–87 and obtained judgment in default on 31 March 1987 against the first defendants for the sum of $10,529,000. In carrying out the project of constructing KL Plaza the first defendants had, upon charging the scheduled lands to a consortium of bankers, obtained a bridging loan of $92m. However, as the first defendants failed to comply with the terms of the loan agreement, the consortium of bankers refused to release the loan sum to the first defendants. Under the circumstances works on the said project were abandoned. Thereafter, negotiations were carried out among the consortium of bankers, the plaintiffs and the first defendants, the outcome of which was that two agreements were executed: (i) an agreement dated 22 April 1987 by which the plaintiffs agreed to complete the said project provided, inter alia, that the first defendants paid the plaintiffs the cost of completing the said project which was in the sum of $26,050,000 (inclusive of the judgment sum of $10,529,000 obtained against the first defendants) to be payable within 18 months from the date of completion of the said project; and (ii) an agreement executed by the consortium of bankers with the first defendants known as a sharing formula agreement dated 29 April 1987 by which the parties arranged, inter alia, as to how payments were to be made to the plaintiffs. As a result of these two agreements, the plaintiffs recommenced the construction of KL Plaza and completed it but apart from some small payments made to it, the first defendants ultimately failed to pay the sum of $23,431,000. The plaintiffs again instituted action in Kuala Lumpur Civil Suit No 22–192–1988 to claim for that sum less the judgment sum of $10,529,000 which came to $12,902,000. Again the plaintiffs obtained

final judgment in default against the first defendants on 17 November 1988 and the latter was ordered to pay the said sum of $12,902,000 to the plaintiffs. As there was no application to stay the execution of the two judgments, the plaintiffs obtained two prohibitory orders against the scheduled lands dated 26 October 1989 pursuant to s 335 of the National Land Code 1965 ('the Code'). The plaintiffs regularly applied for the extension of the period of validity of the two prohibitory orders. On the same date the plaintiffs also obtained two writs of seizure and sale of the scheduled lands. On 26 October 1989 the plaintiffs presented a petition for winding up against the first defendants.

In support of its application for the injunctive orders, the plaintiffs said that unless the interlocutory injunctions were granted, the first or second defendants might probably sell, charge or dispose part of or the whole of the scheduled lands or KL Plaza to a third party thereby depriving the plaintiffs of the fruits of the judgments obtained by them.

I granted the interlocutory injunctions asked for by the plaintiffs at an ex parte hearing on 9 July 1990.

On 5 September 1990, the second defendants applied by way of summons-in-chambers to set aside the interlocutory injunctions in so far as they affected it. The application of the second defendants was supported by an affidavit affirmed by one Teh Chor Tik, the executive chairman of the second defendants affirmed on 5 September 1990. The summary of the second defendants' contentions that can be adduced from the said affidavit are as follows.

By a sale and purchase agreement dated 5 June 1989 executed between the first and second defendants, the first defendants agreed to sell and the second defendants agreed to purchase the sale assets of the first defendants as set out in the said agreement, namely, all the scheduled lands and part of KL Plaza comprising:

(a) a five-storey shopping podium (approximately 234,006sq ft of lettable area);
(b) six units of five-storey shop houses Nos C1 to C6 annexed to the shopping podium (approximately 39,600sq ft of lettable area);
(c) a ten-storey office tower block atop the shopping podium (approximately 78,300sq ft of lettable area); and
(d) car parks of 59 bays at level one, 231 bays at level two, 172 at level three and 27 at an open area.

The said 1989 agreement was varied by a supplementary agreement dated 19 March 1990 executed between the two parties whereby the parties agreed to vary the price and the procedure to complete the sale of the sale assets of the first defendants. Thereafter the first defendants applied to the court to approve the sale of the first defendants' sale assets as stated above on 5 April 1990. The court gave its approval pursuant to s 223 of the Companies Act 1965 ('the Act') for the sale as expressed in the supplementary agreement. Upon the application of the first defendants made on 4 June 1990, the court amended the earlier order granting its consent by adding a paragraph stating that

A the registration effected under s 417 and/or s 420 of the Code under para (d) above shall be without prejudice to and subject to the right, title and interest of the caveats, easement, tenancy, lease or any other encumbrances entered into the register.

Following the court orders of 5 April 1990 and 4 June 1990, the second defendants duly paid to the first defendants the full purchase price to enable it to discharge all the charges made to the consortium of bankers and other chargees. The scheduled lands were duly registered in the name of the second defendants by the Land Office Wilayah on 5 June 1990. It was also asserted that the two prohibitory orders of the plaintiffs were not registered with the Land Office Wilayah until 30 October 1990. Quite apart from that, prior to the registration of the two prohibitory orders there were three winding-up petitions presented to the court to wind up the first defendant company. Winding-up petition No D2–28–514–89 was presented by Syarikat Salehuddin Abdul Aziz Development & Mining Sdn Bhd, a winding-up petition dated 10 December 1987 presented by Morgan Guaranty Trust Co of New York and winding-up petition No D3–517–89 presented by the plaintiffs themselves. By reason of the presentation of the winding-up petitions, the plaintiffs had no right to obtain and register their two prohibitory orders pursuant to the prohibition imposed by s 224 read with s 219(2) of the Act. The remaining contentions of the second defendants related to the question of balance of convenience which I shall deal with presently.

The plaintiffs through their managing director affirmed a further affidavit on 7 December 1990 in which they alleged, inter alia, that the second defendants took the ownership of scheduled lands subject to all encumbrances as ordered by the court including the prohibitory orders of the plaintiffs.

It is appropriate at this stage to examine the law relating to the grant of an interlocutory injunction. The principles by which an interlocutory injunction may be granted by a court are now quite settled in view of Lord Diplock's speech in the leading case of *American Cyanamid Co v Ethicon Ltd*[1] at pp 510–511. The principles that can be distilled from Lord Diplock's speech appear to be as follows. The grant of an interlocutory injunction is a remedy that is both temporary and discretionary and in exercising its discretion whether or not to grant an injunction, the court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case. Where there is a serious question to be tried and the plaintiff's case is neither frivolous nor vexatious the court must go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory injunction sought. The governing principle is that if the recoverable damages would be an adequate remedy, no interlocutory injunction should normally be granted *however strong the plaintiff's claim appears to be* at the interlocutory stage. Equally, if the recoverable damages under the plaintiff's undertaking as to damages would be an adequate remedy for the defendant and the plaintiff is in a financial position to pay them, then there is no reason to refuse the plaintiff an interlocutory injunction. Where other factors appear to be evenly balanced, the prudent course for the court is to

preserve the status quo. Not only is the approach adopted by Lord Diplock in the *Cyanamid* case[1] approved by our Supreme Court, the court in *Associated Tractors Sdn Bhd v Chan Boon Heng & Anor*[2] even went on to say [at p 409]: 'If these factors are evenly balanced it may not be improper for the court to take into account any tipping of the balance as revealed by affidavits.'

Reverting to the case, I noticed that both counsel for the plaintiffs and counsel for the second defendants devoted a great part of their written submissions on matters that could only be resolved at the trial proper and not at this interlocutory stage. They are matters based on conflicting evidence which could only be resolved after detailed arguments and mature consideration of the difficult questions of law and fact at the trial. Both counsel seemed to have overlooked the propositions laid down in the *American Cyanamid* case[1] that the function of the court at this interlocutory stage is to do nothing more than to find out whether the plaintiff has raised some triable issues and whether his claim is frivolous or vexatious. It is only after the court has carried out this first step that it may proceed to the second step to determine the question based on the doctrine of 'balance of convenience'.

In deciding whether the plaintiffs here have raised one or more triable issues, it is necessary to bear in mind that the cause of action as can be culled from this originating summons of the plaintiffs is that since they had obtained the two prohibitory orders pursuant to s 335 of the Code which were duly registered with the Registrar of Titles Wilayah on 30 October 1989, the subsequent transfer of the scheduled lands made on 5 June 1990 which was also duly registered by the Registrar of Titles Wilayah on the same date should be declared null and void by the court as such transfer infringed s 336(1) of the Code which prohibits the registration, endorsement or entry in the register document of title any instrument of dealing executed by or on behalf of the proprietor of the relevant land (and in this case the scheduled lands). Based on this cause of action, the plaintiffs then went on to ask for the two interlocutory injunctions against the second defendants as set out in this originating summons which I have reproduced in the first paragraph of this judgment.

On the other hand, counsel for the second defendants in his written submission contended that:

(1) The plaintiff has *no reasonable cause of* action against the second defendant based on the following three grounds:

   (a) when the prohibitory orders were entered on the said lands on 30 October 1989 there was no equity of the first defendants in the said lands against which the prohibitory orders can be registered. *The prohibitory orders therefore have no effect as the beneficial interest in the said lands have already passed to the second defendants.*
   (b) the second defendants' title to the said lands are indefeasible under s 34 (sic) of the [Code].
   (c) the prohibitory orders relied upon by the plaintiffs are void by virtue of s 224 read together with s 219(2) of the Companies Act 1965.

(2) Non-disclosure of material facts by the plaintiffs in obtaining the ex parte interim injunctions.

(3) The balance of convenience in this case is in favour of the second defendants. (Emphasis added.)

As the sole cause of action of the plaintiffs is based on the two prohibitory orders which they claimed prohibited the transfer and registration of the scheduled lands to the second defendants thereby rendering the said transactions null and void, I shall deal first with ground (1)(c) of the contentions of counsel for the second defendants, namely, that the prohibitory orders obtained by the plaintiffs were void in that they infringed s 224 read with s 219(2) of the Act.

Now s 224 of the Act states: 'Any attachment, sequestration, distress or execution put in force against the estate of the company after the commencement of the winding up by the Court shall be void.' Commencement of the winding up of a company is defined in sub-s (2) of s 219 of the Act which reads: 'In any other case the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up.'

Reading the two sections, I have absolutely no doubt that since the language used in the two sections is so clear and precise they must mean what they say, namely, that any attachment, sequestration, distress or execution put in force against the property, be it movable or immovable, of the company after the presentation of a petition to wind up the company shall be void. The provisions of the two sections are clearly mandatory not only because the word 'shall' is used in both sections but also because unlike s 223 of the Act which provides, inter alia, that any disposition of the property of the company after the commencement of the winding up by a court shall be void *unless the court orders*, there is no such validating power given to the court to validate the things done under s 224 of the Act.

The next question to ask is whether the two prohibitory orders come within the key phrases of s 224 of the Act which are these: 'Any attachment, sequestration, distress or execution put in force against the estate and effects of the company ...' On this point I agree with counsel for the second defendants that the said prohibitory orders are in the nature of an execution of judgment of the court relating to land. In *In re Overseas Aviation Engineering (GB) Ltd*,[3] (which case was drawn to my attention by counsel for the second defendants), Lord Denning observed that 'execution means, quite simply, the process of enforcing or giving effect to the judgment of the court'. In *Re Leitch Collieries Ltd*[4] McCarthy J said: 'To file an execution in the Land Titles Office in this province is to put it in force against the land of the company in liquidation and under s 23 is void.' It is to be noted that the s 23 referred to in the speech of McCarthy J was a section in the Canadian Winding-up Act which is similar to s 224 of the Act. From the authorities cited above, I am therefore satisfied that the two prohibitory orders obtained and registered by the plaintiffs fall within s 224 of the Act.

Counsel for the second defendants had also drawn my attention to two cases which dealt with the scope of s 224. The first case is *Tye Chwee Hoon v Cayman Commodities (M) Sdn Bhd & Anor*.[5] The brief facts of this case are these. On 18 November 1988, the plaintiff judgment creditor obtained final judgment against the first defendants for a sum of money specified in the statement of claim. The plaintiff thereafter proceeded to apply as judgment

creditor for a garnishee order against the second defendant as garnishee. The senior assistant registrar of the court granted a garnishee order to show cause on 22 November 1988. At the hearing of the application to show cause, the senior assistant registrar refused to make the garnishee order absolute and one of the grounds relied on by him was that as the first defendants were subject to a winding-up petition in the Penang High Court by virtue of ss 219(2) and 224 of the Act, the proposed attachment or execution was void. On appeal, the learned judge in dismissing the appeal said, at p 24:

> First, s 219(2) of the Companies Act 1965 clearly provides that in the case of a winding up by the court, as opposed to voluntary winding up under sub-s(1), the winding-up date shall be deemed to have commenced from the presentation of the petition. Secondly, the fact of a winding-up order is to avoid all disposition of the property (including things in action) of the company made between the commencement of the winding up, ie the presentation of the petition and the winding-up order. Therefore, s 224 clearly provides that any attachment or execution against the property of the company after the commencement of the winding up is void. Hence, in the present case, as the winding-up petition against the first defendant had commenced well before the garnishee proceeding was taken in November 1988, the garnishee order made ex parte dated 22 November 1988 is therefore void. Further, there is no basis for me to exercise my powers under s 298(1)(c) Companies Act 1965.

The second case is *Re Barrier Reef Finance & Land Pty Ltd.*[6] In this case an application was made by A to wind up Barrier Reef Finance and Land Pty Ltd ('the company') upon the company's failure to comply with a demand for A$35,000 under s 364 of the Companies (Queensland) Code. Shortly after filing the application for winding up, the judgment creditors of A obtained garnishee orders against the company for the aggregate of A$30,000. A argued that the garnishee orders were of no effect by reason of s 368(3) of the said Code which provided that any attachment put into force against the property of the company after the commencement of the winding up by the court was void. Under s 365 of the said Code, winding up was deemed to have commenced at the time of the filing of the application for winding up. It is interesting to note that ss 368(3) and 365 of the said Code are in pari materia with ss 224 and 219(1) respectively of our Companies Act. In holding that garnishee orders could not be properly taken against an insolvent company after the commencement of winding-up proceedings, two passages from the speech of Connolly J may be reproduced to show the rationale of the decision of the learned judge. The first passage appearing at p 830 of the judgment of the reported case reads:

> From the commencement of the winding up of the company in this case it was 'no longer really the owner of its own property'. That property it held as trustee for the whole of its creditors for equal division and it is wholly inconsistent with this notion that creditors of the applicant should be able to obtain by way of execution the whole of the debt due to him.

The second passage also appears at the same page where it was said:

> It is obvious, in my judgment, that garnishee proceedings cannot be taken against an insolvent company the winding up of which was commenced and, for present purposes, this company must be regarded as insolvent. It follows that

none of the garnishee orders was valid and that any payments made by the company cannot be regarded as payments made in garnishee proceedings. For what it is worth, *Tile Centre* is authority for the proposition that they may be reversed by the courts which made them and that moneys paid may be recovered. The garnishors, however, could not give a good discharge and it follows that the whole sum of $35,000 remains owing by the company to the applicant.

These two authorities therefore support contention 1(c) raised by counsel for the second defendants.

Counsel for the plaintiffs on the other hand submitted that the mere filing of a winding-up petition in court could not trigger off the commencement of winding up by the court. There must be an 'order' made for the winding up by the court before it can be stated that there is in reality a winding up of the company. Only after an 'order' is made by the court does s 219 of the Act make the order retrospective to the date of presentation of the petition. At the hearing of the winding-up petition under s 221 of the Act, the court had power to dismiss the petition or to make any interim order directing the winding up of the company. Counsel then cited the case of *Fleet Motor & General Insurance Co (Aust) Pty Ltd v Tickle*[7] where it was held that 'A compulsory winding up does not in fact commence until the winding-up order is made by the court. Once the order is made the winding up is to be deemed to have commenced at the earlier date.' He also cited a couple of English cases, viz *Re Miles Aircraft Ltd*[8] and *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd.*[9] I shall deal with these cases presently.

The second point made by counsel was that what the court must distinguish is between the right of the company to carry on trading and to control its assets between the date of presentation of the petition and the date of the making of the winding-up order (if any) as against the right of the liquidator appointed after the winding-up order is made to challenge and declare as void the disposition and execution against the company.

The final point raised by counsel was that s 224 of the Act must be read in conjunction with s 298 of the Act in that if and only if a winding-up order is made would s 224 make such executions void. It was argued that s 298 was an amplification of the same and that it prohibited a creditor from retaining the benefit of the execution or attachment before the date of the commencement of the winding up subject to the proviso under sub-s (1)(c) of s 298 of the Act which provides that the rights conferred by the subsection on the liquidator could be set aside by the court in favour of the creditor to such an extent and subject to such terms as the court thinks fit. The discretion of the court is unfettered. Counsel also raised a few more propositions on this issue which involved conflicting evidence and as such they could only be considered at the trial proper of this action.

As to the first point raised by counsel for the plaintiffs, I cannot agree with him simply because as I have said earlier, the language used in both ss 219 and 224 of the Act are so clear that there is no room to accommodate the propositions suggested by the counsel. It may be recalled that counsel cited *Fleet Motor & General Insurance Co*'s case[7] to support his contentions. Let us examine that case in greater depth. The facts of that case briefly stated are as follows. Fleet Motor and General Insurance Co (Aust) Pty Ltd ('the company') had authority to carry on insurance business under the Insurance Act. Proceedings were commenced by the company for an order

that it be wound up and a provisional liquidator was appointed by the court. No winding-up order had then been made in the proceedings. The Insurance Commissioner asserted that the company was precluded from carrying on insurance business by virtue of the operation of s 116(1) of the Insurance Act. The provisional liquidator believed that it might be possible for the company's shares to be sold and the proceeds made available for distribution provided the company was not precluded from carrying on insurance business. Accordingly the company commenced proceedings against the Insurance Commissioner seeking declaratory relief. The critical question posed before the court was whether within the meaning of ss 116(1) and 62(8) of the Insurance Act the company had been 'commenced to be wound up' upon proceedings for winding up being instituted. Section 116(1) were in the following terms:

> Where a body corporate authorised under this Act to carry on insurance business is commenced to be wound up the body corporate shall not, after the date of the commencement of the winding-up carry on insurance business.

It was submitted by counsel for the defendant that the use of the expression 'is commenced to be wound up' indicated that the legislature intended that these words should have the technical meaning which it was said they had under the company law in the case of winding up by the court, namely, that the winding up was to be 'deemed to have commenced at the time of the application for the winding up'. It was therefore argued that for this reason the prohibition in s 116(1) of the Insurance Act came into operation at the time of the commencement of the winding up proceedings. In rejecting the submission of the defence counsel and allowing the declaratory relief sought by the plaintiff, McLelland J said at p 285 of the reported case:

> A compulsory winding-up does not in fact commence until the winding-up order is made by the court. Once the order is made, the winding-up is to be 'deemed to have commenced' at the earlier date. In this context the word 'deemed' is used to create a statutory fiction and in such a case, 'it becomes very important to consider the purpose for which the statutory fiction is introduced' (see per Griffith CJ in *Muller v Dalgery & Co Ltd & Anor* (1909)9 CLR 693 at p 696). I do not see any sufficient basis for supposing that the purpose for which this statutory fiction was introduced extends beyond the purposes of (now) the Companies Act 1981 itself and the equivalent State Codes, in particular I do not consider that this statutory fiction should be introduced into the Insurance Act so as to produce a fictional fact in circumstances where the true fact on which the deeming provision is to operate in the legislation in which it occurs (viz the making of a winding-up order) does not exist.

The ratio decidendi of that case is that the deeming provisions of the company law which creates a statutory fiction should be confined to the Companies Act and should not be allowed to be imported into the Insurance Act particularly when the latter Act did not have such a deeming provision. The observation of the learned judge about when a winding up commenced is mere obiter. More importantly, the obiter dictum of the trial judge in the *Fleet Motor* case[7] is diametrically incompatible with the principles enunciated in the later case of the *Barrier Reef Finance*[6] and the case of *Galbraith v Grimshaw*[10] cited by the trial judge in the *Barrier* case.[6] The *Fleet Motor* case[7] is therefore of no assistance to the plaintiffs.

As regards the two English cases cited by counsel to support his contentions, it is important to note that the English statutory provisions relating to the prohibition against subjecting the property of a company to attachment, sequestration, distress or execution order are worded differently. This can be seen from the language used in s 523(1) of the English Companies Act 1985 which is the counterpart of s 224 of the Act. The wording of s 523(1) has been reproduced in 4 *Halsbury's Statutes* (4th Ed) at p 810 [see also 8 *Halsbury's Statutes* (4th Ed) at p 533] and they are as follows:

> Where a company registered in England and Wales *is being wound up by the court*, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up is void. (Emphasis is mine.)

I agree with counsel for the second defendants that it is clear even upon a cursory reading of the English s 527(1) that it is not in pari materia with our s 224. Under the English provisions, it is clearly spelt out that any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up *is void where the company is being wound up by the court.* It is significant to note that the phrase 'where a company registered in England and Wales is being wound up by the Court' is omitted in our s 224. The decisions of the English cases being based on the interpretation of their s 523(1), are not appropriate in construing the scope of our s 224.

Turning to the second point raised by the defence counsel, no one can dispute that prior to the appointment of a liquidator or the making of a winding-up order the company concerned has the right to carry on trading and to control its assets between the date of presentation of a winding-up petition and the date of the making of a winding-up order. However, the said company cannot in the course of its carrying on trading and controlling the assets, act in contravention of s 223 of the Act. Neither could the property of the company be subject to attachment, sequestration, distress or execution order pursuant to s 224 of the Act.

As to the final point raised by counsel, viz the need to consider the effect of reading s 224 in conjunction with s 298 of the Act, I cannot agree with such a proposition. Apart from the fact that there is absolutely nothing stated in the two sections that they must be read in conjunction with each other it is futile to construe s 224 as dependent on or subject to s 298 for in doing so it will not only render s 224 redundant but it will also obliterate the purpose for which s 224 was enacted. One of the principles of construction of a statute is that in enacting a provision in a statute, the legislator intended the provision to serve a purpose and the purpose can only be construed from the words used in that provision. Thus in Maxwell's *Interpretation of Statutes* (11th Ed) it is stated at p 4:

> When the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. It is not allowable, says Vattel, to interpret what has no need of interpretation. *Absoluta sententia expositore non indiget.* Such language best declares, without more, the intention of the lawgiver, and is decisive of it. The rule of construction is 'to intend the legislature to have meant what they have actually expressed'. It matters not, in such a case, what the consequences may be. Where, by the use of clear and unequivocal language

> capable of only one meaning, anything is enacted by the legislature, it must be enforced, even though it be absurd or mischievous. The underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the court as to what is just and expedient. The words cannot be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason why they should be excluded or embraced. However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. When once the meaning is plain, it is not the province of a court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words.

Applying the aforementioned principles to this case, it is absolutely clear to me that the purpose of enacting s 224 is to ensure that between the date of the presentation of a winding-up petition and the date of the passing of the winding-up order the property of the company should not be dissipated to enrich one or more unsecured creditors at the expense of other unsecured creditors. Thus in *E Pritchard v Westminster Bank Ltd*[11] it was held:

> The overriding rule was that all creditors should be treated equally, accordingly the garnishee order which had the effect of giving the plaintiff preference over all other creditors ought not to have been made.

This finding was partly due to the following passage of Lord Denning's speech at p 1001 where he said: 'The court will not allow one creditor however diligent he may be to get an advantage over the others by getting in first with a garnishee order.' The approach adopted in the *E Pritchard* case[11] was followed in at least two other English cases, namely, *D Wilson (Birmingham) Ltd v Metropolitan Property Developments Ltd & Anor*[12] and *Rainbow & Anor v Moorgate Properties Ltd.*[13]

On the other hand, s 298 deals with a situation when a company has been wound up and it is subsequently discovered that a creditor has managed to evade the prohibition stated in s 224 and issued execution against the goods or land of a company or has attached any debt due to the company. Under such circumstances, that creditor shall not be allowed to retain the benefit of the execution or attachment against the liquidator unless he has completed the execution or attachment before the date of the commencement of the winding up. It is therefore clear that ss 224 and 298 deal with completely different situations. While the purpose of s 224 is to *preserve* the assets of the company from the date of the presentation of a petition for winding up of the company, the purpose of s 298 is to empower the liquidator to *recover* any dissipation of the assets of the company which had been wrongly acquired by a creditor through an evasion of the prohibition set out in s 224.

A useful case to illustrate the definition of commencement of the winding up appearing in s 223 of the Act is the case of *Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors.*[14] In this case there were several issues raised before the trial court but I need only refer to the issue relating to whether the transfers of certain properties by the plaintiffs to the defendants after the presentation of a winding-up petition but before the winding-up order was made were void pursuant to s 223 of the Act. The facts of the case relevant to this issue can be briefly

stated as follows. The plaintiffs owned some lands which the trial judge, Yusoff Mohamad J (as he then was) for convenience described them as the first portion, comprising 503 acres of lands held under State leases numbered 2198 to 2241, Lots 3320 to 3420, the second portion comprising 87 acres of land held under CT 14799 to 14815, Lots 3302 to 3318, and the third portion comprising 303 acres held under Grant 21955 Lot 2679. On 13 November 1978 the government of Malaysia presented a petition to the High Court of Malaya at Johore Bahru for the winding up of the plaintiff company under s 218(1)(e) of the Act on the ground that it was unable to pay its judgment debt due to the government. On 21 November 1978 the plaintiffs transferred the first portion of its lands to the defendants and the transfer was duly registered by the Land Office on the same date. On 30 November 1978 one Paramjothy, whom the learned judge found as holding the said lands as bare trustee of the plaintiffs, also transferred the second portion of the lands to the defendants which transfer was duly registered on the same date. Again on 30 November 1978 one PF Wong, whom the learned judge also found to be holding the said lands as bare trustee of the plaintiffs, transferred the third portion of the lands to the defendants which likewise was duly registered on the same date. The winding-up order was made only on 11 March 1979. The learned judge held that as the transfers and registrations were made after the commencement of the winding up, that is to say after presentation of the petition to wind up the plaintiff company, they were void pursuant to s 223 of the Act. The learned judge, however, exercised the discretion provided in s 223 to grant a validation order to validate the transfers and registrations of the three portions of lands on the ground that the first defendants acted bona fide as they had no knowledge of the presentation of the winding-up petition by the government.

The matter went on appeal to the Supreme Court — see *Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors*.[15] In upholding the decision of the learned trial judge where he found that the transfers of the three portions of lands were void pursuant to s 223 of the Act, Seah SCJ said at p 455:

> The learned judge held (correctly in my view) that the transfers of the first, second and third portions of the estate to the first respondent were void by reason of s 223 of the Companies Act 1965 but he, however, in the exercise of his discretion, validated them. Learned counsel for the second appellant had submitted that the learned judge was wrong to validate these said transfers and that he had exercised his discretion on wrong principles. For the first respondent, learned counsel now concedes that these three dispositions were *made at the time of registration at the Land Registry office and since all three of them were registered after the presentation of the winding-up petition by the court on 13 November 1978 they were therefore void under s 223 of the Companies Act 1965.* (Emphasis is mine.)

Seah SCJ went on to hold that in the circumstances of the case, the learned trial judge had wrongly exercised the discretionary power under the said s 223 to validate the transfers. The decision of the Supreme Court in the *Lian Keow* case[15] fortifies the proposition that all dispositions of the property and effects of a company made between the commencement of the winding up (that is the presentation of the petition) and the order for

winding up shall be void unless the court otherwise orders pursuant to s 223. Bearing in mind that the same words ie 'after the commencement of the winding up' are used in both s 223 and 224 which is stated in s 219 to mean the date of presentation of the petition for the winding up, it must follow that all attachments, sequestration, distress or execution put in force against the estate or effects of the company made within the interval of the presentation of the petition to wind up the company and the date when the order for winding up was made must be void. This is a wholesome and necessary provision to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of the company. The prohibitory orders obtained by the plaintiffs had the effect of not only restraining the first defendants from dealing with the scheduled lands but also gave the plaintiffs the right to the disposal of the lands to satisfy the judgment sum due to them. This the plaintiffs could not do in view of the earlier presentation of the petitions for winding up of which one of the petitions was filed by the plaintiffs themselves. For these reasons I am satisfied that the plaintiffs have no right under the law to take out the two prohibitory orders — they are null and void pursuant to s 224. On this ground alone the plaintiffs have failed to establish that they have raised any triable issue that could only be resolved at the proper trial of the case. The institution of this action by the plaintiffs is not only frivolous and vexatious, it is also an abuse of the process of the court.

Even if the action of the plaintiffs could be sustained (to which I cannot accede), the granting of the interlocutory injunction to them is on the balance of convenience improper simply because the plaintiffs could be fully compensated upon the sale of the 131 apartments of which the first defendants are still the owners. I have been given to understand by counsel for the first defendants and counsel for the plaintiffs that an order had been obtained from the commercial division of the High Court to sell the said apartments at a price which would be very much more than sufficient to satisfy the judgment sums of the plaintiffs.

For the reasons as stated above I allow the application of the second defendants and revoke the interlocutory injunction granted ex parte to the plaintiffs in so far as it restrains the second defendants from selling, charging, etc the scheduled lands. The interlocutory injunction granted to the plaintiffs restraining the first defendants from selling and transferring the possession of 131 apartments is no longer necessary as the first defendants and the plaintiffs had by consent obtained an order of court to sell them at a fixed price. The third interlocutory injunction restraining the second defendants from selling, charging etc of the 131 apartments too is redundant as the second defendants have no legal or equitable right to dispose of the 131 apartments. The plaintiffs must pay the costs of these proceedings to the second defendants.

Application of the second defendants allowed.

Reported by Wong Kian Kheong